

¹ Under separate Orders, Judge Avery ordered a court-ordered IME with Dr. Edward Prosic to address neck pain and numbness in claimant's upper extremities and a court-ordered IME with Dr. Bernard Abrams to address headaches and blurred vision.

Claimant argues the appeal should be dismissed for the reason that respondent did not raise the issue of compensability at the preliminary hearing.

The issue raised on review is: Did claimant incur a medical condition arising out of and in the course of his employment that resulted in him being temporarily and totally disabled?

FINDINGS OF FACT

The following exchange occurred at the preliminary hearing:

JUDGE AVERY: Okay. Counsel, we had discussions off the record. Claimant is seeking a treatment from a neurologist, specifically Dr. Reddig, who has been seeing him as unauthorized care. The payment of temporary total disability from 10-21-12 until further order. There has been an agreement on a average weekly wage of \$767.78 for today's purposes. This is a 6-24-12 accident. Respondent raises no compensability defenses. However, it's respondent's position that the claimant is at maximum medical improvement and no longer in need of additional medical care or is eligible for temporary total compensation. Any additions, modifications corrections to that record before we get started.

MR. DOWNING: No, that's fine.

MR. GORDON: None.²

PRINCIPLES OF LAW

The Appeals Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.³ This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury or injury by repetitive trauma, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.⁴

² P.H. Trans. at 4-5.

³ K.S.A. 2011 Supp. 44-551.

⁴ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁵

ANALYSIS

Respondent argues Judge Avery erred by awarding temporary total disability benefits because claimant's accidental injury did not result in claimant being temporarily and totally disabled. Respondent attempts to couch the issue in terms of whether claimant is temporarily and totally disabled due to an injury that arose out of and in the course of his employment. Respondent asserts claimant failed to prove compensability and failed to present any evidence if the alleged accident was the prevailing factor in his resulting medical condition, disability or impairment.

No compensability defenses were raised at the preliminary hearing. Rather, respondent argued at the preliminary hearing that claimant was not temporarily and totally disabled. Respondent assented to Judge Avery's statement that respondent was not presenting any compensability defenses. Arguments that are not presented to the administrative law judge will not be considered by the Board.⁶

Additionally, although Judge Avery may have made a decision that respondent believes was wrong, that decision was his alone to make at this juncture of the claim. Whether Judge Avery erred in awarding temporary total disability benefits is not appealable. Judge Avery had the jurisdiction and authority to grant or deny temporary total disability benefits at the preliminary hearing. Judge Avery did not exceed his jurisdiction in awarding temporary total disability benefits. The issue of whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2). Accordingly, the Board does not have jurisdiction to address this issue at this juncture of the proceedings.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

⁵ *Allen v. Craig*, 1 Kan. App. 2d 301, 303 and 304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

⁶ *Hainline v. Floyd's Town & Country Supermarket*, No. 1,030,755, 2007 WL 1390709 (Kan. WCAB. Apr. 3, 2007).

⁷ K.S.A. 44-534a.

CONCLUSION

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member concludes: (1) the Board is without jurisdiction to entertain respondent's compensability argument that was not raised at the preliminary hearing; (2) Judge Avery did not exceed his jurisdiction in awarding temporary total disability benefits; and (3) whether Judge Avery erred in awarding temporary total disability benefits is not subject to Board review from a preliminary hearing. When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that respondent's appeal of the Order of Administrative Law Judge Brad E. Avery dated November 27, 2012, is dismissed.

IT IS SO ORDERED.

Dated this _____ day of January, 2013.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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Honorable Brad E. Avery